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ABSTRACT

In higher education collective bargaining litigation, the determination of which academic personnel will be included in bargaining units has resulted in many contradictions. Supervisory and managerial personnel have been included with faculty in some schools, and excluded in others. Law and medical school faculty, support staff, and part-time employees have encountered the same treatment; being welcomed among the faculty units at some institutions and categorically excluded at others. These confusing distinctions have occurred in both public and private sectors and afflict multi-campus schools as well as single campuses. In reviewing these cases, however, certain criteria can be distilled that coordinate these seeming contradictions. The primary criterion at the base of unit determination is "community of interest," a concept developed in the private industrial sector. The list of criteria for unit determination of the National Labor Relations Board includes similarity in earnings, benefits, work performed, and job skill requirements, as well as the desires of the affected employees and the institution's history of collective bargaining. There may, of course, be more than one appropriate unit, but only one is chosen; and both sides are tempted to include those whose union views are similar to their own. Each diverse group represented in a unit must be adequately represented. Relevant cases are cited. (DR)

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Unit Determination: Basic Criteria in Federal and State Jurisdictions Trends in Exclusion of Supervisory and Managerial Personnel, Faculty in Professional Schools, Multi-Campus Units, Support Professionals, Part-Time Personnel and Others

By

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"Unit Determination: Basic Criteria in Federal and State Jurisdictions. Trends in Exclusion of Supervisory and Managerial Personnel, Faculty in Professional Schools, Multi-Campus Units, Support Professionals, Part-Time Personnel, and Others."

Collective Bargaining in higher education is a relatively recent phenomenon (a good brief history may be found in an ERIC publication authored by Dan Julius entitled "Collective Bargaining In Higher Education: The First Decade").

The present extent of collective bargaining in American colleges and universities may be followed in a series of publications sponsored by the National Center for the Study of Collective Bargaining in Higher Education and by the Academic Collective Bargaining Information Service.

Dividing Gaul into three parts was relatively simple in contrast to the tasks which the NLRB and state agencies, boards, and commissions have had in making unit determination decisions. Unit determination decisions and cases in the higher education realm have largely drawn upon the private industrial sector experience, with some interesting exceptions.

Today I shall merely hit some of highlights. If you are seriously interested in learning more about this subject, I would refer you to the proceedings of this conference which will contain full reference to the cases I shall briefly cite today. There are also several good references if you are a serious student of this subject of unit determination: (Show these volumes: Barbara C. Davis, "The Legal Aspects of Unit Determinations in Faculty Collective Bargaining at Public

Institutions of Higher Education." A doctoral dissertation completed at Georgia State University in 1976. The title is really inaccurate, for it traces in great detail the private college experience too. Joyce M. Najita, Guide to Statutory Provisions in Public Sector Collective Barganing: Unit Determination, Third Issue. University of Hawaii, April 1977. And Doris Ross, "Cuebook: State Education Collective Bargaining Laws," Report No. F78-9, Denver, Colorado: Education Commission of the States, October 1978. I shall also refer to several other excellent pieces as I go along.)

It is easy to get confused--for there are seemingly contradictory determinations. I would like to give you some examples in each of six categories.

Supervisory and Managerial Personnel. In the C.W. Post case deans were excluded as supervisors and not joined in the faculty unit because they effectively recommended the employment of faculty, but in the University of San Francisco and Catholic University of America cases assistant and associate deans in the law school were included in the faculty units. Similarly, department chairpersons have been held to be in or out of the unit (for example in the Fordham University case and out in the Adelphi University case) depending on circumstances which we shall discuss shortly, and have even been held to be out of the unit and later included in as these circumstances changed, as in the second Fairleigh Dickinson University case.

Faculty in Professional Schools. Here too there are seeming contradictions in both NLRB and state agency determinations: In the Fordham University case the NLRB allowed the creation of a separate unit of the law school faculty although the administration objected and the competing labor organizations concurred. In the Syracuse University case, both the labor organization and the administration sought inclusion in one unit, but the NLRB permitted a separate Law School unit. In the University of Vermont case the Medical School faculty were excluded despite the fact that two of the labor organizations would have been willing to include them. In the Wayne State University determination, the State Commission included the Medical School faculty in the university-wide unit even though the competing labor organizations desired to exclude it. In the University of Minnesota case separate units were permitted for the school of law and health sciences, but not for the college of verterinary medicine. In the University of Florida determination the State PERB established separate units for the Law School, Health Center, and the Institute of Food and Argicultural Sciences, but declined a separate unit for the engineering faculty.

Multi-Campus Units. Although some states (e.g. Hawaii) have settled the matter of multi-campus inclusion/exclusion by legislation, more commonly the NLRB or state agencies have decided these issues. But, again, we have seemingly contradictory conclusions:

The NLRB, for instance, allowed the creation of separate units for each of three campuses in the Long Island University case, but only one unit for the three campuses in the Fairleigh Dickinson University case. Rhode Island has separate units for each of the state's three public institutions, while New York has one. A number of states have favored one larger unit for their public institutions (e.g., Pennsylvania, Florida, and Vermont). While others (e.g., New Hampshire, Montana, and Nebraska) have determined that each separate campus represents an appropriate community of interest. Garbarino, Feller, and Finkin reported on two interesting examples in the states of New Jersey and Minnesota: ten years ago, in 1969, the New Jersey PERC created separate units for each of the six state colleges. However, each of the campuses selected affiliates of the same representing organization and negotiated, not with the local boards, but with the New Jersey Board of Higher Education, resulting in a single statewide agreement. When, subsequently, a competing organization sought to oust the incumbents on several campuses, the State argued for and won a single unit. In Minnesota, the State PERB held for separate campus units for the state colleges, but the Supreme Court of Minnesota disagreed, reversing the ruling. Later, the PERB refused to follow the court's reasoning in determining the appropriate unit for the University of Minnesota, and determined that each of the University's five campuses was an appropriate unit. As indicated earlier, however, it has since been judicially determined that separate bargaining units be established for the law and health sciences faculties, and all other faculties at the main campuses included in a single unit statewide.

Support Professionals. Now we get to even more complicated contradictions. Librarians have been included in a common unit in cases such as University of Vermont and State Agricultural College, and University of San Francisco, but excluded in the Claremont Colleges case. In the Catholic University of America case, a head librarian who had supervisory authority over two assistant librarians who were included in the unit, was excluded. If such a person, however, devotes less than 50 per cent of his or her working time to supervising non-unit employees, he or she may be included in the faculty unit, according to the Mt. Vernon College case. To further complicate matters: in the recent Boston University case, a unit of professional librarians at the main and satellite libraries, but excluding librarians in the law, medical, and theology schools, was deemed appropriate.

Then there is the case of counselors: guidance counselors have been found to be included, say in the Northeastern University case, but admissions counselors were excluded.

NTP's are included in one all-inclusive unit in the State University of New York, but form their own separate unit in the Pennsylvania State College system. In Michigan, the MERC refused to accept its own trial examiner's exclusion of NTP's from the faculty bargaining unit in the Eastern Michigan University and Wayne State University cases, but the decision was reversed by the State Court of Appeals. Needless to say, other states have lined up on both sides of this issue, and given similar circumstances in two neighboring states, we sometimes have two different determinations.

There are other classes of support professionals: What about faculty members who are also engaged in administering programs outside their teaching responsibilities. These "Principal Investigators" are included in the faculty unit if the employees they supervise are not in the unit, according to the New York University case, but are excluded if they hire other faculty members to assist in the program, as in the Rensselaer Polytechnic Institute case and the University of Vermont case. In Maine the State Board recently ruled that "soft money" faculty qualified for inclusion in the regular unit, although they were ineligible for tenure.

In 1974 the NLRA was amended so as to eliminate the statute's exclusion of all private hospitals and clinics. In 1975 in the Goddard College case the NLRB ruled that nurses do not share a sufficient community of interest with faculty to warrant inclusion in the faculty unit. Other cases have included nurses occasionally.

Perhaps a classic group with regard to confusion are Interns, Residents, and Clinical Fellows, otherwise known as "housestaff." In the Cedars-Sinai Medical Center case they were held to be not "employees" within the meaning of the NLRA, but students continuing their medical education. However, contrary to the findings in this case, the Prince George's County (MD.) PERB Hearing Officer ruled that such persons were students who were also employees, and most recently the U.S. Court of Appeals for the District of Columbia instructed the U.S. District Court for the District of Columbia to reconsider its previous ruling that it did not have authority to judicially review the 1976 certification proceeding, saying that congress intended housestaff to be covered by the NLRA.

Part-Time Personnel. In the earlier cases like the University of New Haven regular part-time faculty were included in the same unit as full-time faculty. This ruling was to have been applied unless the parties in other cases agreed to exclude them, as occurred in the Fordham University case quoting Justice Felix Frankfurther's observation that "Wisdom too often never comes, and so the one ought not to reject it merely because it comes late." In the public sector state agencies have divided on the issue, with some units including part-timers and others excluding them. Exceptions have been made by the NLRB to the NYU rule: In the Kendall College case, for example, part-timers who were paid on a per-course basis, similar to adjunct faculty at NYU and elsewhere were excluded, while those paid on a pro-rata salary (and who were like full-time faculty in participating in college goverance) were included. Interestingly, in the Cottey Junior College case, administrators, who would normally be excluded from the faculty unit, but who taught on a part-time basis, were included in the faculty unit!

In recent series of cases, cited in Head and Kelley, there is some indication that part-timers are increasingly being included within full-time bargaining units in the public sector. In the University of Massachusetts ruling the labor relations commission included the regular unit part-time faculty on all campuses of the university if they had taught at least one course for three consecutive semesters. In California a hearing officer in the San Joaquin Delta case included within the unit all part-timers who had served more than two semesters within a three-year period, and after this the California

Educational Employment Relations Board ruled in the Los Rios Community College District case that all part-time instructors who taught classes for an equivalent of three of the preceding six semesters should be included within a full-time unit.

OTHERS. Closely related to part-time employees are several classes of "temporary" employees. In the Santa Monica Community College District case, the California State Court of Appeals affirmed a lower court decision which classified part-time teachers as temporary, and hence, not eligible for inclusion. In Connecticut, the State Board found that a teacher employed for more than one-half of an average load for only one term, but not a full-time academic year, was covered because the statute did not exclude temporary employees. Excluded, however, are those who worked less than seven and one-half contract hours in any one semester. The case is on appeal. The Minnesota Supreme Court ruled that teachers employed for less than 100 days to fill positions left vacant by faculty members on leave of absence are not public employees under the State Act and are not to be included in the bargaining unit. In New Hampshire, the State Supreme Court affirmed a State PERB decision that lecturers at Keene State College were temporary employees not entitled to collective bargaining rights under the State law. In California, a State Board Hearing Officer ruled that summer school employees in the Anaheim Unified School District were entitled to placement in a separate unit. While this has not yet been extended to the area of higher education, the reasoning could well be the same.

Similarly in the private sector, according to Fanning, the NLRB has ruled on questions relating to unit determination of temporary, part-time, and emeritus faculty. In the Stevens Institute of Technology case, a visiting professor on a one-year contract to replace a professor who was on sabbatical leave was excluded as temporary, while in the Manhattan College case, "terminal-contract" faculty who had been informed that their contracts would not be renewed were held to be eligible to vote in a representation election. In the University of Vermont and State Agricultural College case emeritus faculty were excluded unless they teach full-time, whereas in the University of Miami case, faculty holding non-tenure track positions were found to have a sufficiently close community of interest to be included. According to Walther, in the Goddard College case an NLRB panel concluded that since the record indicated that only 5 to 10 per cent of the visiting faculty were offered permanent positions, their work is temporary and they were not entitled to be placed in the same unit with full-time faculty; however, in the Community College of Philadelphia case, the State Board found a community of interest with full-time faculty, and hinted that they should be placed in the same unit; on the basis of the petition before them it was not possible to do so, so the visiting lecturers were granted their own separate unit.

There are other employee groups, but in the interest of time, I should like to move on to the criteria employed in cases of the type cited.

What principles or criteria can we distill from this welter of cases and sometimes seemingly contradictory findings?

Frequently in higher education, we have studies which contradict one another; for example, the influence of class size on instruction, the influence of using television to supplement the classroom presentation, etc.

While the cases cited above often seem to contradict each other, the decisions are usually based on an analysis of particular situations at each institution, on a case-by-case basis, and we can generalize from the findings.

The overarching criterion "community of interest" developed from the private industrial sector. A relatively long list of criteria or factors has developed to measure or determine whether there is a "community of interest" or other compelling reason to join faculty members and others together in an appropriate bargaining unit for purposes of collective negotiations. First, there is a list of NLRB "community of interest" criteria, summarized in the St. Francis College case:

Similarity in the scale and manner of determining earnings

Similarity in employment benefits, hours of work, and other terms and conditions of employment

Similarity in kinds of work performed

Similarity in qualifications, skills, and training of employees

Frequency of contact or interchange among employees

Relationship to administrative organization of employer

History of collective bargaining

Desires of affected employees

Extent of union organization

In addition, both the NLRB and state agencies, boards, and commissions, in the cases cited in this paper have utilized these other measures, some of which overlap the list above:

Similarity in job classification and/or title, the methods by which these are determined, and the statutory authority of the public employer

Centralization of management

Competing claims of bargaining representatives and the administration

Interdependence or autonomy of schools and campuses, including differences in calendars, faculty-student ratios, funding sources, etc.

Commonality of supervision

Educational requirements and specialized training

Administrative level of authority

Extent of integration of work functions

Separate accreditation status

Professional identification-allegiance

Also utilized are:

Principles of efficient administration or government

Effects of over-fragmentation

Geographical location

Compatability of the unit with joint responsibilities of the employer and employees to serve the public

Sound or effective employer-employee relations

And, of course, the ubiquitous:

Other factors deemed appropriate.

Finally, for purposes of generating further discussion, there are several questions which should be raised:

There may actually be more than one appropriate unit, but the NLRB and state agencies need not choose the most appropriate unit, merely an appropriate unit. In fact, with regard to professional school faculty the NLRB recognized in a series of cases that both inclusive and separate units were equally appropriate, leaving the ultimate determination to be a function of the desire of the faculty.

When this occurs, faculties may choose for the right or wrong reasons. For instance, a law school faculty may feel that in an inclusive unit it would have to subsume its voice in dealing through a university-wide collective bargaining agent, and that it might be given short shrift in matters of special interest and salary.

Of course, in making unit determination petitions, both sides are tempted to include or exclude those elements of the faculty and staff who are pro- or anti- unionization in order to affect the outcome of the election. For example, Kelley and Gerry have shown us that faculty unions wishing to exclude religious faculty from the bargaining unit have cited conflict of interest and poverty vows in order to keep out from the unit those perceived to be less than enthusiastic about collective bargaining.

Fortunately, the NLRB and alert state boards, utilizing the well-accepted criteria, are quick to see through such maneuvering. But what if they do not?

There is the danger that the administration might want to "divide and conquer" and hence permit "internal balkanization," as Finkin has put it. But the administration might well be faced with over-fragmentation, having to deal on too many fronts, and whipsawing of units right on its own campus. The bargaining representative, on the other hand, wanting to add as many dues-paying members as possible, and for other reaseons, could end up with a diversity of interests in the same unit, and might find that it would have to accommodate to all. Finkin quite properly pointed out that:

> ... inclusion of groups heretofore unrepresented in governance and the exclusion of others who in the past may have been considered colleagues will have some effect on institutional decision-making.

Among the dynamic complications, notes Finkin, is the fact that:

> ...as each new group with diverse interests is included in the unit, the bargaining agent must work to bring it and its particular needs and concerns into the organization, so that it can be adequately represented.

Failure to do so, I contend, can lead to centrifugal pulling away from the unit on the parts of those groups which perceive themselves to be inadequately represented.

A second major question which should be faced was raised by John H. Fanning, Chairman of the National Labor Relations Board, in dissenting from a series of law school and medical school cases. He found that faculty members for the purposes of the NLRA are not unique, that the differences in industry between craft groups and other employees are greater than the difference between law and medical faculty and other faculty. Others like Chandler and Julius have noted that the trend of segregating professional school faculty into their own collective bargaining units resembles the creation of specialized unions of craft workers in industry, and that some of the criteria employed could well be extended to almost any professional school,

and perhaps to some academic departments. Surely this question, interrelated to the last one about fragmentation will have to be addressed in the near future.

Finally, are we inviting in too many outsiders--legislatures and courts in making educational and academic decisions, and, perhaps, other unwanted bargaining representative into the vacuum? Perhaps in this regard it would be wide if the lion and the calf should lie down together, remembering, of course, Woody Allen's admonition: The calf may not get much sleep. We all might not, however, if we do not resolve some of these questions.

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